INDEX

	Page
Opinions below	1
Jurisdictional statement	2
Questions presented	3
Statutes involved	4
Statement	4
Specifications of errors to be urged	7
Reasons for granting the writ	7
Conclusion	24
Appendix	25

CITATIONS

Cases:

Abbs v. *Ford Motor Co.*, E.D. Mich. Civil No. 6880	11
Adams v. *Long*, 202 S. W. (2d) 112	10
American Banana Co. v. *United Fruit Co.*, 213 U. S. 347	11, 14, 16
Anderson v. *J-M Service Corp.*, D. Kansas No. 1671	11
Assel v. *Hercules Powder Co.*, D. Kansas No. 5995	11
Bernhard v. *Metcalfe Const. Co.*, 64 F. Supp. 953	14
Blackmer v. *United States*, 284 U. S. 421	16
Blain, Ex parte, 12 Ch. Div. 522	11
Bumpus v. *Remington Arms Co.*, 77 F. Supp. 94	10
Burns v. *Metcalfe Const. Co.*, 69 F. Supp. 381	14
Caldarola v. *Eckert*, 332 U. S. 155	2, 23
Chatwin v. *United States*, 326 U. S. 455	12
Clearfield Trust Co. v. *United States*, 318 U. S. 363	2, 23
Coleman v. *United States*, 81 Fed. 824	17
Connell v. *Vermilya-Brown Co.*, 164 F. 2d 924, certiorari granted, March 29, 1948, No. 608, this Term	14
Crabb v. *Welden Bros.*, 65 F. Supp. 369, reversed on other ground, 164 F. 2d 797	10
Cromer v. *Hercules Powder Co.*, D. Kansas No. 6120	11
Deal & Co., Inc. v. *Marlin*, 209 Ark. 967	10
Federal Crop Insurance Corp. v. *Merrill*, 332 U. S. 380	2
Filardo v. *Foley Bros., Inc.*, 181 Misc. 136	14
Frost & Co. v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38	2
German Alliance Insurance Co. v. *Home Water Supply Co.*, 226 U. S. 220	23
Greenstein v. *Pan American Airways, Inc.*, 185 Misc. 429	10
Harrington v. *Empire Construction Co.*, 71 F. Supp. 324	10

Cases—Continued	Page
Holy Trinity Church v. *United States*, 143 U. S. 457	12
Kasper v. *National Electric Products Corp.*, 165 F. 2d 434	10
Kelly v. *Grimshaw*, 161 Kan. 253	10
Kuly v. *White Motor Co.*, 11 Labor Cases, Par. 63,434	11
Lawrence v. *Fox*, 20 N. Y. 268	23
MacEvoy Co. v. *United States*, 322 U. S. 102	15
McDaniel v. *Brown & Root, Inc.*, 7 WH Cases 978	10
McGuire v. *Hercules Powder Co.*, 7 WH Cases 658	11
Moehl v. *duPont*, 12 Labor Cases, Par. 63,545	10
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	18
Robins Dry Dock & Repair Co. v. *Flint*, 275 U. S. 303	23
Smith v. *Townsend*, 148 U. S. 490	12
State v. *Carter*, 27 N. J. (3 Dutcher) 499	11
Sweet v. *B. F. Goodrich Co.*, 68 F. Supp. 782	11
Timmonds v. *United States*, 84 Fed. 933	16
United States v. *Allegheny County*, 322 U. S. 174	2, 23
United States v. *Carbone*, 327 U. S. 633	12
United States v. *Martin*, 94 U. S. 400	16
United States v. *Moses*, 126 Fed. 58, certiorari denied, 195 U. S. 632	16
United States v. *Post*, 148 U. S. 124	18
Walling v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945	18
Willis v. *duRont*, 76 F. Supp. 1010	10
Statutes:	
Act of May 24, 1888, 25 Stat. 157	18
Act of August 1, 1892, 27 Stat. 340	14, 15
Act of June 19, 1912, 37 Stat. 137	16
Act of June 28, 1940, c. 440, 54 Stat. 676, 678, 50 U.S.C. App. 1155:	
Sec. 5(a)	18
Sec. 5(b)	18
Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U.S.C. 276a, 276a-2	10, 14, 20
Eight Hour Law (Act of August 1, 1892, 27 Stat 340, as amended; 40 U.S.C. 321, *et seq.*)	2, 4, 10
Sec. 321	7, 20, 25
Sec. 322	7, 15, 26
Sec. 324	7, 16, 27
Sec. 325	7, 29
Sec. 325a	8, 17, 18, 30
Sec. 326	7, 31.
Fair Labor Standards Act, 29 U.S.C. 203(e), 216(b):	
Sec. 3(e)	14
Sec. 16(b)	20
Miller Act, Sec. 1(b), 40 U.S.C. 270a(b)	15

Statutes—Continued Page

Portal to Portal Bay Act, 61 Stat. 84, 29 U.S.C.A. 251, *et seq.* 11, 21
Second Supplemental National Defense Appropriation Act, 1941, 54 Stat. 872 19
Urgent Deficiencies Appropriation Act (Act of February 27, 1906), c. 510, 34 Stat. 27, 33 13
Walsh-Healey Act (Act of June 30, 1936), 49 Stat. 2036, 41 U.S.C. 35, *et seq.* 10, 15, 21

Miscellaneous:

Army Procurement Regulations, Paragraph 5-402.3 22
18 Comp. Gen. 646 22
19 Comp. Gen. 516 14
20 Comp. Gen. 233, 235-236 18
20 Comp. Gen. 890 22
21 Comp. Gen. 1110, 1112 18, 22
24 Comp. Gen. 376, 377 17, 22
86 Cong. Rec. 11216-11217 19
86 Cong. Rec. 11569 19
Executive Order 9240, as amended, 7 F.R. 7159, 7419 10
Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., pp. 2719-2720 21
H.R. 10263, 76th Cong., 3d Sess. 19
H. Rep. 2916, 76th Cong., 3d Sess., p. 5 19
Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141 9, 14
25 Op. A. G. 441 13
29 Op. A.G. 488 14
34 Op. A.G. 257, 259-260, 261 12, 13
39 Op. A.G. 418 16
Restatement Contracts § 145 23
W. D. Procurement Regulation No. 346 22

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 91

FOLEY BROS., INC. AND SPENCER, WHITE & PRENTIS, INC., PETITIONERS

v.

FRANK PAUL FILARDO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

The Solicitor General, on behalf of Foley Bros., Inc., and Spencer, White & Prentis, Inc.,[1] prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York entered on March 24, 1948, on remittitur from the Court of Appeals (R. 141-142).

OPINIONS BELOW

The oral rulings of the Supreme Court of New York, New York County (R. 81, 84), are not re-

[1] The Solicitor General is appearing on behalf of petitioners because, in accordance with the provisions of its contract with petitioners here involved, a wartime "cost-plus" contract, the Department of the Army will ultimately have to pay such judgments as may be here rendered against petitioners.

ported. The opinion of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department (R. 129-131) is reported at 272 App. Div. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 12, 1948 (R. 138-139). The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision denied a title, right, privilege, or immunity specially set up and claimed by petitioners under the Eight Hour Law (40 U.S.C. 321, *et seq.*), as amended by the Act of September 9, 1940, c. 717, Title III, § 303, 54 Stat. 872, 884, 40 U.S.C. 325a, and under petitioners' contract with the United States. The cases relied on to sustain the jurisdiction of this Court are *Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380; *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367.

Respondent brought suit in the Supreme Court of New York, New York County, to recover overtime compensation for work performed in a foreign country under the Eight Hour Law, as amended, and as third party beneficiary to the

contract between petitioners and the United States (R. 3, 4-5). Petitioners' answer denied that respondent was entitled to recover under either the Eight Hour Law or the contract (R. 5, 6-7). The same issues were raised by a motion to dismiss (R. 48-52), by a motion for directed verdict (R. 81) and by a request for charge to the jury (R. 84), all of which were denied by the trial court (R. 75, 81, 84), and again by an exception to the charge as made to the jury (R. 84) and a motion to set aside verdict (R. 86). In the Appellate Division and the Court of Appeals, petitioners raised the same questions in their written brief and oral argument. The court below rejected petitioners' contention and ruled for respondent (R. 132-138).

The question presented is one of substance as is more fully developed under reasons for granting the writ (*infra*, pp. 7-24).

QUESTIONS PRESENTED

1. Whether the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. Whether, assuming the applicability of the Eight Hour Law in the performance of a Government construction contract, employees of the Government's contractor have recourse to the courts to recover overtime compensation either (a) by reason of a cause of action arising under that statute or (b) as third party beneficiaries of a con-

tractual provision requiring the contractor to comply with the laws of the United States.

STATUTES INVOLVED

The pertinent provisions of the Eight Hour Law (Act of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. 321, *et seq.*), are set out in the Appendix *infra*, pp. 25-31.

STATEMENT

The undisputed facts follow:

On November 10, 1941, petitioners entered into a cost-plus contract with the United States whereby petitioners were to construct roads, buildings and bases in the Middle East (R. 4, 98). In the contract, petitioners agreed *inter alia* to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). In February, 1942, petitioners hired respondent, an American citizen, to work as a cook on these construction projects at the salary of $60 per week (R. 14, 87, 88). Respondent's contract of employment with petitioners required him to "devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (R. 89). The employment contract contained no provision for overtime pay, but respondent's weekly salary was set pur-

suant to a formula which set his wages at 150% of 85% of the New York prevailing wage rates (R. 60).

Pursuant to his contract, respondent went to petitioners' projects in Iraq and Iran (R. 15, 82). He worked a total of seventy-four weeks during 1942 and 1943, including the time of his transportation, for all of which he received an average weekly wage of $68.38 (R. 82).[2] During that time he frequently worked more than eight hours a day and requested that he be paid for the work performed in excess of eight hours a day but his request was refused (R. 19-23, 94). Upon his return to the United States, respondent again requested payment for the work performed in excess of eight hours a day, which request was again rejected (R. 22, 95-96).

Respondent, thereafter, on July 29, 1943, brought this suit against petitioners in the Supreme Court of the State of New York, County of New York, under the Eight Hour Law to recover for compensation for work in excess of eight hours a day allegedly due him thereunder[3] (R. 3, 4-5). Petitioners' answer, filed on January 6, 1944, de-

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[2] Respondent from time to time received various voluntary salary increases (R. 24).

[3] The complaint as amended set forth two causes of action. The first, an attempt to set aside the employment contract and recover in *quantum meruit* for the "reasonable value" of respondent's services, was subsequently dismissed on motion of the petitioners (R. 48, 75). Respondent took no appeal to the Appellate Division from this dismissal, and hence that issue is no longer in the case.

nied that respondent was entitled to any recovery (R. 5, 6-7). A trial was had before a jury. During the course of the trial, petitioners moved to dismiss the complaint on the ground that the Eight Hour Law conferred no right of action on respondent to sue his employer for overtime wages (R. 48-52). The trial court denied the motion, holding that the Eight-Hour Law "* * * applies beyond the limits of the United States. The plaintiff has a right to bring this action" (R. 77, 81). At the close of the trial, petitioners joined in respondent's motion for a directed verdict (R. 81). They thereafter requested the court to charge that there is no right of action for overtime conferred on respondent by the Eight Hour Law, and excepted to its refusal so to charge (R. 84). Petitioners also excepted to the court's charge that the Eight Hour Law conferred a right of action upon respondent for overtime wages (R. 84) and moved to set aside the verdict (R. 86). The jury found that respondent had worked for a total of 1172 hours overtime (R. 85), and that on the basis of one and one-half times his average rate of pay per hour, the sum of $2,496.36 was due him (R. 85). The court added interest in the amount of $650 and costs of $181.60, and entered judgment for $3,327.96 (R. 1, 12, 13).

Upon appeal to the Appellate Division, First Department, the judgment of the Supreme Court was reversed (R. 128). The court concluded, two judges dissenting, that neither the Eight Hour

Law nor the 1940 amendment thereto conferred a right of action for overtime wages, and in view of this conclusion, did not pass on the other questions raised (R. 131). Appeal was taken by respondent to the Court of Appeals, which reversed the judgment of the Appellate Division (R. 132-138).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. In holding that the Eight Hour Law conferred a right upon respondent to sue petitioners for compensation for work in excess of eight hours a day.

3. In holding that respondent could maintain a suit against petitioners for compensation for work in excess of eight hours a day as a third party beneficiary of the contract between petitioners and the United States.

4. In reversing the judgment of the Appellate Division of the Supreme Court of New York.

REASONS FOR GRANTING THE WRIT

The Eight Hour Law prior to 1940 (40 U. S. C. Sections 321-326) required contractors with the United States to limit the services of their laborers and mechanics to eight hours per day. The statute

was enforceable criminally and through the withholding of civil penalties by the Government. In 1940 the Act was amended to permit work in excess of eight hours per day if compensated at time-and-a-half the basic rate of pay (40 U. S. C. Section 325a).[4]

The New York Court of Appeals has held that the Eight Hour Law, as amended in 1940, applied to construction work performed for the United States in foreign countries, that respondent had, by virtue of the 1940 amendment, a statutory right of action to recover time and one-half on work in excess of eight hours a day, and that in any event respondent had a contractual right to recover such compensation as a third party beneficiary of the contract between petitioners and the United States. Each of these holdings raise important and substantial questions of Federal law as to which there has been no authoritative decision and as to which a decision of this Court, and not of a state court, should be the governing precedent.

The Department of the Army advises that, during World War II, it permitted many cost-plus

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[4] The amendment reads as follows:

> Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

contractors to pay time and one-half for hours over eight per day on contracts to be performed in foreign countries. This permission was granted as a matter of inducement in order to aid contractors to secure employees for such projects. In these cases, as here, however, the usual Eight Hour Law provision required in domestic contracts was customarily omitted.[5] Many laborers and mechanics were not paid time and one-half for overtime work.[6] We are advised by the Department of the Army that the extension below of the Eight Hour Law to government contracts performed in foreign countries may open the way to many similar claims on such cost-plus contracts. In addition, the decision below that a worker may sue his employer either under the Eight Hour Law as amended or as a third party beneficiary to the government contract containing such a provision, will be relied on in other cases not only as a construction of the Eight Hour Law itself, but also as a precedent for implying a private right of action against an em-

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[5] None of the 900 foreign procurement contracts entered into by the Board of Economic Warfare included an eight-hour law provision. Instead, pursuant to a labor policy agreed upon by BEW, the Coordinator of Inter-American Affairs and the State Department, two standard forms of labor clause paragraphs were formulated; both these forms referred questions of hours of work, together with other problems of labor relations, to the customs and conditions prevailing at the site of performance in the foreign country. Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141, 146-147.

[6] In the instant case, respondent's weekly wage was, as stated, *supra*, p. 4, computed at 150% of 85% of the rates prevailing in New York.

ployer for work or wages by virtue of contracts involving the Bacon-Davis and Walsh-Healey Acts, and Executive Order 9240, as amended (7 F. R. 7159, 7419) (providing double time for the seventh day).

There is an increasing number of workers' claims against employers for overtime and for additional compensation being filed under these various statutes on the theories adopted below, and the lower courts, both state and federal, are in disagreement as to whether recovery on these theories are permissible.[7] In addition, thousands of other such claims may reasonably be anticipated. In this connection it is important to note that the Eight Hour Law, unlike the Fair Labor Standards,

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[7] In the following cases the court has held that the worker has no right to sue under these statutes or under contract provisions embodying these statutes: *Willis* v. *duPont*, 76 F. Supp. 1010 (E. D. Okla.), pending on appeal (suit by 1688 claimants under Eight Hour Law and Bacon-Davis Act); *McDaniel* v. *Brown & Root, Inc.*, 7 W. H. Cases 978 (E. D. Okla.) pending on appeal (suit by 201 claimants under Eight Hour Law and Bacon-Davis Act); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.) (Exec. Order 9240); *Harrington* v. *Empire Construction Co.*, 71 F. Supp. 324 (D. Md.) (Exec. Order 9240); *Greenstein v. Pan American Airways Inc.*, 185 Misc. 429 (Sup. Ct. N. Y. County) (Walsh-Healey Act); cf. *Kelly* v. *Grimshaw*, 161 Kan. 253 (Bacon-Davis Act); *Adams* v. *Long*, 202 S.W. (2d) 112 (Mo. App.) (Exec. Order 9240).

Contra: *Deal & Co., Inc.* v. *Marlin*, 209 Ark. 967 (Eight Hour Law); *Moehl* v. *duPont*, 12 Labor Cases par. 63,545 (N. D. Ill.) (Exec. Order 9240); *Crabb* v. *Welden Bros.*, 65 F. Supp. 369 (S. D. Iowa), reversed on other ground, 164 F. 2d 797 (C. C. A. 8) (Exec. Order 9240).

There are a number of cases which have been dismissed because the individual claims were for less than $3000: *Crabb* v. *Welden Bros.*, 164 F. 2d 797 (C.C.A. 8) (Exec. Order 9240); *Kasper* v. *National Electric Products Corp.*, 165 F. 2d 431

Bacon-Davis, and Walsh-Healey Acts, was not amended by the recent Portal to Portal Pay Act. Moreover, the Portal Act in terms does not appear to reach the use of third party beneficiary theories even as to those statutes which the Act specifically amends.

1. *Extraterritoriality:* There is serious doubt whether Congress intended the Eight Hour Law to be given extraterritorial application. The decision below emphasized the fact that the law by its terms embraced "*Every contract* made to which the United States * * * is a party" (emphasis supplied by court below), and concluded that "Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad" (R. 136). But, as stated by Mr. Justice Holmes, "all legislation is *prima facie* territorial." *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Ex parte Blain*, 12 Ch. Div. 522, 528; *State* v.

(C.C.A. 3) (Exec. Order 9240); *Sweet* v. *B. F. Goodrich Co.*, 68 F. Supp. 782 (N. D. Ohio) (Exec. Order 9240); *McGuire* v. *Hercules Powder Co.*, 7 W. H. Cases 658 (E. D. Tenn.) (Exec. Order 9240); *Kuly* v. *White Motor Co.*, 11 Labor Cases Par. 63,434 (N. D. Ohio) (Exec. Order 9240).

The files of the Department of Justice, which are incomplete since the contractor in most of these cases is now represented by private counsel, show that the following cases based on the theory of a private right of action are pending: *Abbs* v. *Ford Motor Co.*, E.D. Mich. Civil No. 6880 (suit by over 6000 claimants under Bacon-Davis Act); *Anderson* v. *J-M Service Corp.*, D. Kansas No. 1671 (suit by over 5000 claimants under Eight Hour Law, Exec. Order 9240 and Walsh-Healey Act); *Cromer* v. *Hercules Powder Co.*, D. Kansas No. 6120 (suit under Walsh-Healey Act and Exec. Order 9240); *Assel* v. *Hercules Powder Co.*, D. Kansas No. 5995 (suit under Walsh-Healey Act and Exec. Order 9240).

Carter, 27 N. J. (3 Dutcher) 499. In addition, while it is a well settled principle of construction that the meaning of the legislature is to be determined, if possible, from the language of the act, it is equally well established that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected. *United States* v. *Carbone*, 327 U. S. 633, 637-639, 642; *Chatwin* v. *United States*, 326 U. S. 455; *Smith* v. *Townsend*, 148 U. S. 490, 494; *Holy Trinity Church* v. *United States*, 143 U. S. 457. The purpose of Congress in enacting the Eight Hour Law was, we submit, to improve only domestic working conditions.[8] As the late Chief Justice Stone, when Attorney General of the United States, pointed out in answering the inquiry from the Secretary of State whether the Eight Hour Law applied to alien labor[9] employed in the construction of the American embassy in London (34 Op. A. G. 257, 259-260):

> The purpose of the statute under consideration [*i.e.* the Eight Hour Law] is for the im-

[8] There is no question here involved as to the power of Congress to prescribe hours of work and rate of compensation on government contracts regardless of where the work is performed. The sole question is whether Congress intended to exercise its full power. For that reason, the workmen compensation cases cited by the court below, which deal with the question of power (R. 137), are here irrelevant.

[9] Since the inquiry from the Secretary of State was whether the Law covered alien labor in a foreign country, the opinion of the Attorney General is likewise so phrased. There, however, is nothing in the rationale of the opinion or the Law itself to justify applying the Law extraterritorially to American citizens, while excluding aliens.

provement of labor conditions. Can there then be imputed to Congress the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States, even when the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in a foreign country?

In the absence of express provisions in the statute plainly indicating the intent of Congress to apply the restrictions of the Act to the employment of alien labor on public works of the United States being performed in a foreign country, I do not think such intent can be imputed. * * *.[10]

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[10] Attorney General Stone goes on to distinguish the earlier opinion of his predecessor (25 Op. A. G. 441), cited by the court below (R. 136). This earlier opinion upheld the application of the Eight Hour Law to public works of the United States within the Canal Zone in language suggesting that the Act might also be applicable in foreign countries. But at the time the work was to be performed, the United States, by treaty of the Republic of Panama had acquired "all the rights, power and authority within the zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory * * * to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.". See 34 Op. A. G. at 261. Moreover, it is significant that Congress in appropriating additional monies for the construction of the Panama Canal in the Urgent Deficiencies Appropriation Act of 1906 (Act of February 27, 1906, c. 510, 34 Stat. 27, 33) expressly provided that the Eight Hour Law should not apply to alien laborers employed in the construction of the canal.

In answer to an inquiry from counsel for the respondent, an assistant solicitor of the Department of Labor advised respondent's counsel by letter that the conclusion he draws from the two Attorney Generals' opinions mentioned above "seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided the worker otherwise comes within the provisions of the Act".

And in 19 Comp. Gen. 576, both the Secretary of State and the Comptroller General indicated that the extraterritorial application of the Law might easily lead to serious difficulties in effecting contracts for necessary services in countries where social and business conditions and customs differ widely from our own. See also 29 Op. A.G. 488; cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141.

Moreover, the original Eight Hour Law was enacted in 1892 (Act of August 1, 1892, 27 Stat. 340), a time when Congressional policy with regard to bettering labor conditions was in its infancy as compared to the legislative attitude at the time of passage of the Bacon-Davis and Fair Labor Standards Acts. Yet the geographic scope of these later Acts is expressly restricted to the United States and its territories and possessions. See Bacon-Davis Act, 40 U.S.C. 276a; Section 3(c) of the Fair Labor Standards Act, 29 U.S.C. 203(c);[11] *Burns* v. *Metcalfe Const. Co.*, 69 F. Supp. 381 (W.D. Mo.); *Barnhard* v. *Metcalfe Const. Co.*, 64 F. Supp. 953 (D. Neb.); *Filardo* v. *Foley Bros., Inc.*, 181 Misc. 136 (Sup. Ct. N.Y. County).[12] Similarly the

[11] *Connell* v. *Vermilya-Brown Co.*, 164 F. 2d 924 (C.C.A. 2), certiorari granted, March 29, 1948, No. 608, this Term, cited below (R. 136), involves the question whether a Bermuda base held by the United States under a 99-year lease is such a territory or possession of the United States, and therefore is not relevant here.

[12] This *Filardo* v. *Foley* case involved a suit by respondent against petitioners herein for the same overtime compensation

Walsh-Healey Act (41 U.S.C. 35, *et seq.*) by regulation of the Secretary of Labor, issued pursuant to his power to grant exemptions from the Act (41 U.S.C. 40), does not cover contracts to be performed outside the geographic limits of the United States and its territories. Moreover, under Section 1(b) of the Miller Act (40 U.S.C. 270a(b)), contracting officers are authorized to waive, *inter alia*, the requirement of a payment bond, for so much of the work under the contract as is to be performed in a foreign country, despite the fact, which this Court has recognized, that these bonds are required for the protection of the contractor's employees. *MacEvoy Co.* v. *United States*, 322 U. S. 102, 104, and cases cited. All these statutes and regulations indicate that, even though the benevolent policy of the Government with regard to working conditions has been greatly developed and expanded, Congress has not yet made, but on the contrary has specifically declined to make, the extension which the court below finds by implication in the Eight Hour Law, the applicability of that policy to work performed in foreign countries.

The implementation of the Law by criminal sanctions and penalties is another factor which should be considered in determining whether the statute was to be applied extraterritorially. Section 322 of the Law (40 U.S.C. § 322) (Act of

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as here involved. That suit was, however, brought under the Fair Labor Standards Act, and Judge Pecora ordered the complaint dismissed on the ground that the FLSA does not apply extraterritorially.

August 1, 1892, 27 Stat. 340) declares intentional violations to be misdemeanors, punishable by fine or imprisonment. The 1912 amendment (Act of June 19, 1912, 37 Stat. 137) adding civil sanctions (Section 324) expressly did not modify or limit the pre-existing statutory provisions and left the criminal sanctions as an integral part of the Law (see 39 Op. A.G. 418). In these circumstances, it was clearly improper for the court below to limit its consideration of the Law's coverage as if it imposed only civil liabilities (R. 136-137). When these criminal sanctions are considered, it would appear that the Law's geographic limits are defined by the traditional rule that criminal statutes are not to apply extraterritorially, even as to American citizens, unless a contrary intent appears. *Blackmer* v. *United States*, 284 U. S. 421, 437; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. As already indicated, no such intent is here manifest.

2. *Statutory Right of Employees to Sue:* The court below recognized that prior to the 1940 amendment, the Eight Hour Law was in the nature of a mandatory direction from the Government to its agents; that it did not constitute a contract requiring payment for work in excess of eight hours a day, and hence that the Law gave to a worker no right to recover compensation for that work. *United States* v. *Martin*, 94 U. S. 400; *United States* v. *Moses*, 126 Fed. 58 (C.C.A. 9), certiorari denied, 195 U. S. 632; *Timmonds* v. *United States*,

84 Fed. 933 (C.C.A. 7); *Coleman* v. *United States*, 81 Fed. 824 (D. Ky). That court, however, went on to hold that the 1940 amendment made "it abundantly clear that the statute is now designed to do more than merely declare a desirable policy" (R. 136), and that in light of the Law's purpose, should be construed to bestow a right to sue upon employees within its coverage (R. 134-136). The position of the Department of the Army on this question is as follows:

Congress did not intend by the 1940 amendment to convert the Eight Hour Law from merely a mandatory directive to government agents and contractors supported by penal sanctions to a grant of a right of action to employees. The amendment is framed in terms of a suspension of the absolute bar previously imposed under the Eight Hour Law, upon the condition of payment of time and one-half for work in excess of eight hours per day. It was enacted at a time when the Nation's security was threatened, when the need for labor was acute, and is concerned only with the relaxation of the limitation on employment in excess of eight hours in order to make that labor available. The amendment does not change the nature of the Eight Hour Law as a policy directive running from the Government to its contractor. It merely varies the content of the mandate to meet pressing current needs, relaxing the absolute prohibition of the Law as it stood prior to 1940.

20 Comp. Gen. 233, 235-236; 21 Comp. Gen. 1110, 1112; 24 Comp. Gen. 376, 377; cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 949 (C.C.A. 6). Such a provision is no more than a Congressional instruction to its agents as to the terms and conditions under which the Government will contract and was not intended to create any rights in private individuals to enforce these instructions. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129.[13]

Nor could such a drastic change of policy be based on the meager legislative history of the amendment. On June 28, 1940, about three months prior to the enactment of the amendment, Congress had provided for the suspension, during the period of national emergency, of the Eight Hour Law as applied to civilian employees of the War and Navy Departments and the Coast Guard "where additional employees cannot be obtained to meet the exigencies of the situation," and for the payment of one and a half times the regular rate for overtime work to these employees. Act of June 28, 1940, c. 440, Sec. 5(a), 54 Stat. 676, 678, 50 U. S. C. App. 1155(a). Section 5(b) of that statute suspended without more the Eight Hour Law as ap-

[13] The statutory provision here involved is very different from that involved in *United States* v. *Post*, 148 U. S. 124, on which the court below relied (R. 134). The statute there involved (Act of May 24, 1888, 25 Stat. 157) expressly stated that "If any letter-carrier is employed a greater number of hours per day than eight he *shall be paid extra* for the same in proportion to the salary now fixed by law." (Emphasis supplied).

plied to persons engaged in work covered by Army, Navy or Coast Guard contracts. It was to eliminate the confusion resulting from the limited coverage of Section 5(b) that the amendment to the Eight Hour Law here involved was enacted on September 9, 1940. It was added to H. R. 10263, 76th Cong., 3d Sess., which became the Second Supplemental National Defense Appropriation Act, 1941 (54 Stat. 872), by amendment offered from the Senate Floor by Senator McKellar. The amendment was accepted with practically no discussion. Senator Thomas did insert a statement explaining the amendment's purpose in the Record (86 Cong. Rec. 11216-11217).[14] As a result of Conference, the Managers on behalf of the House of Representatives initially recommended disagreement with the proposed amendment (H. Rep. 2916, 76th Cong., 3d Sess., p. 5), but when the question came up for discussion on the floor of the House, it was moved, and the House voted without discussion, to recede from its disagreement and concur in the Senate amendment. 86 Cong. Rec. 11569.

To change a law so long regarded as merely declaratory of public policy, and penal in its nature, into a statute affording to aggrieved employees

[14] Senator Thomas there stated that by the amendment "it is * * * * proposed that the rigid limitations of the existing 8-hour law of 1912 be modified by permitting work in excess of 8 hours per day but subject to the requirement that overtime work be compensated at not less than time and one-half the regular rate of pay."

a remedy by court action calls for a clearer expression of legislative purpose than has been here manifested by Congress. As already indicated, Congress imposed criminal sanctions for the intentional violation of the Eight Hour Law (40 U.S.C. 321). In addition, the contractor is subjected to civil sanctions in the form of a withholding of a $5 penalty for each violation of the Law, with an express provision for a remedy, administrative and judicial, whereby the contractor may recover improperly imposed penalties. The Law is silent as to any judicial and administrative machinery made available to employees, and we believe this silence to be significant. Where Congress has intended to provide a statutory procedure, administrative or judicial, whereby an employee was to receive compensation, it has experienced no difficulty in expressly doing so in the various statutes enacted within five years prior to the 1940 amendment. Under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216(b), the employee himself may bring suit against his employer for the overtime compensation to which he is entitled under the Act. Under the Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U.S.C. 276a, 276a-2, employees receive that compensation from the Comptroller General who is authorized to withhold the necessary monies and to pay it over to them; and if the payments withheld are insufficient to reim-

burse all the employees, the Act further provides that they may bring suit for the difference in the name of the United States to their own use against the contractor or his surety in accordance with the provisions of the Miller Act. The Walsh-Healey Act, 41 U.S.C. 36, provides for the withholding of monies due on contracts or recovery thereof for underpayments of wages through a suit brought in the name of the United States by the Attorney General, and for the payment of such monies, on order of the Secretary of Labor, over to the employees concerned.[15]

In this connection, the enactment of the recent Portal to Portal Pay Act, 61 Stat. 84, 29 U.S.C.A. 251, *et seq.*, is also significant. By this statute, Congress restricted the rights of employees to recover for claims in various situations arising under the Fair Labor Standards Act. The same restrictions were specifically extended to the Bacon-Davis and Walsh-Healey Acts in order to eliminate the possibility that claims of the type which Congress intended to ban might reappear by use of statutes other than the Fair Labor Standards Act. That no reference is made in the Portal Act to the Eight Hour Law affords a fair

[15] A memorandum submitted by the Solicitor of the Department of Labor to Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., Hearings on proposed amendments of the Fair Labor Standards Act, pages 2719-2720, suggests that employees may have a right to sue under the Walsh-Healey Act and the Bacon-Davis Act, reviewing legislative statements in connection with the Portal-to-Portal Act which might lead to that conclusion.

basis for the assumption, that the latter statute was not deemed to have any connection with the question of employee suits.

3. Employee's right to sue as third party beneficiary: The holding below that respondent could recover as a third party beneficiary of the contract between petitioners and the Government is necessarily predicated on the inclusion in the contract of the requirements of the Eight Hour Law. The contract did not contain an Eight Hour Law provision, the specific inclusion of which is mandatory where the contract is administratively considered to be subject to the Law. See W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5-402.3; 18 Comp. Gen. 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376. Without regard to the administrative view here evidenced by the omission of such a specific provision, the court below read the Law into the contract on the basis of the customary general provision that petitioners "obey and abide by all applicable laws * * * of the United States."

Even assuming, *arguendo,* that this general provision suffices to import the Eight Hour Law into the contract, it does not necessarily follow that respondent here may sue as a third party beneficiary. That question, involving the construction of the contract between petitioner and the United States is, as the court below recognized

(R. 137), one of federal, rather than state, law.[16] *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367. And, as formulated by this Court, the federal rule as to third party beneficiaries appears to be that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 307-308; cf. Restatement Contracts § 145. Whether an Eight Hour Law provision in the contract is intended for the direct benefit of persons in the class of respondent depends on the purpose of that provision, which in turn relates back to the intent of the Eight Hour Law. The court below by carrying over its holding that the Law was intended for the benefit and protection of employees to this phase of the case had no difficulty in holding respondent a third party beneficiary (R. 137). But, if, as has been urged, *supra*, pp. 16-21, the Law was not intended to confer a direct benefit on employees, but rather constituted only a mandatory direction

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[16] For this reason, the various New York cases cited below, including *Lawrence* v. *Fox*, 20 N. Y. 268, are relevant only in so far as they follow "principles of general contract law" (R. 137). They are irrelevant to the extent that they formulate state law.

to government agents and contractors, then, inasmuch as no direct benefit was intended for employees by virtue of a contractual provision embodying the Law, these persons, contrary to the view of the court below, did not have a right to sue as third party beneficiaries of such a provision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

APPENDIX

The pertinent provisions of the Eight Hour Law, 40 U.S.C. 321 *et seq.* are as follows:

§ 321. Eight-hour day on public works; river and harbor dredging; longer hours unlawful.

The service and employment of all laborers and mechanics who are or may be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are or may be employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform serv-

ices similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this section and section 322 of this title, shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. (Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

§ 322. Violation of act punishable.

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of section 321 of this title, shall be

deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed $1,000, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. Aug. 1, 1892, ch. 352, § 2, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

* * * * *

§ 324. Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction of penalty; appeals; right of action in Court of Claims.

Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any of-

ficer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this section directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or sub-

contractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. (June 19, 1912, ch. 174, § 1, 37 Stat. 137.)

§ 325. Same; contracts excepted; work included; waiver in time of war; when penalty not to be imposed; eight-hour law not affected.

Nothing in section 324 of this title shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided,* That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section 324 of this title. The President, by Executive Order, may waive the

provisions and stipulations in this section and section 324 of this title as to any specific contract or contracts during time of war or at a time when war is imminent. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this section or section 324 of this title shall be construed to repeal or modify sections 321-323 of this title, or apply to contracts entered into under the provisions of appropriation Acts approved prior to June 19, 1912. (June 19, 1912, ch. 174, § 2, 37 Stat. 138.)

§ 325a. Same; computation of wages on basic day rate of eight hours; work in excess of day rate.

Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

(Sept. 9, 1940, 9 a.m., E.S.T., ch. 717, title III, § 303, 54 Stat. 884.)

§ 326. Suspension of eight-hour law in case of emergency; overtime pay.

In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States; *Provided*, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours work in excess of eight hours. (Mar. 4, 1917, ch. 180, 39 Stat. 1192.)

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